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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 519

In the Matter of the Application of

JEROME BRICKER,

Petitioner,

for Admission to the Bar of the State of New York

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In the Matter of the Application of

JEROME BRICKER,

Petitioner,

for Admission to the Bar of the State of New York

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in Application of Jerome Bricker for Admission to the Bar of New York, on May 28, 1969.

Opinions Below

Petitioner's application for admission to the New York State Bar was denied by the Appellate Division, Second Department, on May 7, 1962. A motion for reconsideration was denied on November 26, 1962. A motion to renew petitioner's application was granted by the Appellate Division, Second Department, on October 26, 1966. Petitioner's renewed application was denied on March 18, 1968 by the

Appellate Division, Second Department. A motion for leave to appeal to the Court of Appeals was granted on May 20, 1968. The Court of Appeals affirmed the denial of petitioner's application on May 28, 1969.

No opinions have been rendered herein. The above-mentioned orders of the New York Courts are printed in the Appendix *infra*.

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 28, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Is it a violation of due process of law for New York to deny petitioner's application for admission to the bar solely on the basis of a 1967 change in residence, when petitioner's original application was unconstitutionally denied in 1962?

2. Is it a violation of due process of law for New York to retroactively apply its new residence requirements to petitioner's attempt to correct the unconstitutional denial of his 1961 application for admission to the bar?

Constitutional and Statutory Provisions Involved

Article XIV, Amendments to the Constitution of the United States (in part):

> "No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Law and Rules, Rule 9406(3) [eff. 1965].

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice.

New York Civil Practice Law and Rules, Rule 9406(3) [in effect prior to 1965, derived from Rule 1(e) of the Rules of Civil Practice].

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

3. that he has been an actual resident of the state of New York for six months prior to the filing of his application for admission to practice.

Statement of the Case

In February 1961, the petitioner herein, Jerome Bricker, applied for admission to the Bar of the State of New York. Utilizing pre-*Willner* investigation procedure, the Committee on Character and Fitness for the Second Judicial Department recommended that petitioner's application be denied. On May 7, 1962, the Appellate Division, Second Department, accepted the Committee's recommendation and denied petitioner's application.

At no time during the investigation was the petitioner informed of the nature of the evidence, if any, against him, or permitted any opportunity to present rebuttal evidence. He was permitted neither to confront nor to cross-examine his accusers.

On May 13, 1963, this Court in *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963), condemned the failure to afford applicants for admission to the New York State Bar an adequate "due process" hearing. Under the minimal standards set forth in *Willner,* petitioner's 1961 application was undoubtedly denied without due process of law.

In 1966, represented by counsel for the first time, petitioner moved in the Appellate Division, Second Department to reopen the denial of his application based upon *Willner*. This motion was ultimately granted and on October 26, 1966, petitioner's application was referred to the Commit-

tee on Character and Fitness for a determination of petitioner's then character and fitness to become an attorney.

After having submitted a questionnaire to the Committee in January, 1967, petitioner was finally notified that a hearing was to be held on his application on June 22, 1967. Approximately two weeks after this hearing, petitioner voluntarily notified the Committee that he had purchased a home in New Jersey, within commuting distance of New York City.

The Committee thereupon determined that petitioner no longer complied with the residence requirements of Section 9406(3), of New York's Civil Practice Law and Rules, effective September 1, 1965, requiring for the first time that a bar applicant maintain continuous residence in New York during the period of the pendency of his application. Prior law had required only that an applicant have been a resident of New York prior to filing his application, thereby permitting residence in New Jersey or Connecticut during an application's pendency. It thereupon recommended against admission on the grounds of non-residence. The Appellate Division accepted the Committee's recommendation and the New York Court of Appeals affirmed, solely on the basis on non-residence.

At issue, therefore, is whether the 1965 change in New York law concerning continuing residence for Bar admission, and the 1967 change in the place of petitioner's residence, both of which occurred during the five year lapse period between the violation of petitioner's constitutional rights in 1962 and the attempt at their vindication in 1967, may constitutionally preclude any effective relief.

Reasons for Granting the Writ

Under the most ideal conditions a period of time must inevitably elapse between the violation of a constitutional right and the vindication of that right by a competent authority. This case raises the issue of the extent to which a change of circumstances during the inevitable lapse period between the violation of a constitutional right and its vindication may be the basis of precluding any vindication whatsoever.

If such a change in circumstances is either the result of the constitutional violation, or would not have been prejudicial to the wronged party but for the constitutional violation, due process of law prohibits such a change in circumstances from precluding ultimate vindication of the wronged party's constitutional rights.

I.

It is a violation of due process of law to deny petitioner's renewed application on the basis of his 1967 change of residence because such a change of residence would not have been prejudicial to petitioner but for New York's unconstitutional denial of his original application.

Over six years after his original application was unconstitutionally denied, and over six months after his renewed application had been filed with the Committee on Character and Fitness, petitioner was compelled to purchase a larger home in order to care for his invalided father. He purchased that home in New Jersey, within commuting distance of New York City. New York has seized upon this change in petitioner's factual circumstances to deny his attempt to redress the unconstitutional denial of his application for admission to the Bar. The utilization by New York of this change in petitioner's circumstances, which, but for New York's unconstitutional denial of his application in 1962, would have been irrelevant, is an attempt by New York to benefit as a result of its own unlawful conduct. As such it must be rebuffed.

The thesis that a government may not exploit the fruits of its own illegal action is certainly not a novel one. This Court has not hesitated to enforce it rigorously at both the federal and state levels. E.g., *Boyd* v. *United States,* 116 U.S. 616 (1886); *Weeks* v. *United States,* 232 U.S. 383 (1914); *Byars* v. *United States,* 273 U.S. 28 (1927); *Olmstead* v. *United States,* 277 U.S. 438 (1928); *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

In addition to the cases arising under the Fourth Amendment climaxing in *Mapp*, this Court has prevented the government from relying upon the results of official misconduct.

In *Moser* v. *United States*, 341 U.S. 41 (1951), this Court invoked the principle of "elementary fairness" to prevent an alien from forfeiting his rights to American citizenship on the basis of unclear and conflicting advice from the Department of State and the Swiss legation. Chief Justice Minton reasoned that but for the unfair action of the government, the alien would never have found himself in a vulnerable position. He, therefore, refused to permit the government to assert the vulnerability against him.

In *McLeod* v. *Peterson*, 283 F. 2d 180 (3rd Cir. 1960), the Third Circuit refused to permit the results of an unlawful governmental act to deprive an alien of his status as a "resident" of the United States.

In *McLeod*, an alien who was lawfully declared deportable in 1956 was erroneously denied permission to petition for discretionary suspension of deportation at that time. He thereupon voluntarily left the country after having been assured by Immigration officials that he could return pursuant to a non-quota visa. He was unable to secure such a visa and illegally returned to the United States approximately one year later. He was arrested in 1958 and deportation proceedings were commenced. The alien once again petitioned for discretionary suspension of deportation, but his petition was denied on the ground that his one year absence from the United States prevented him from meeting the requirement of "five years of continuous residence."

Chief Judge Biggs, writing for a unanimous Court, observed:

> "Had that right [to apply originally for discretionary suspension in 1956] been granted, as it should have been, the appellant would have been entitled to a stay of deportation pending the Attorney General's disposition. Thus, it is plain that absent the illegal action of the Immigration authorities, McLeod might not have lost the right that he now seeks." 283 F. 2d at 187.

The Court went on to rule that McLeod's sojourn in Canada, traceable as it was to governmental error, could not be used against him.

In *Tejeda* v. *Immigration and Naturalization Service,* 346 F. 2d 389 (9th Cir. 1965), the Ninth Circuit ruled that if a Consular official in Manila had incorrectly denied Tejada re-admission to the United States in 1947, he was entitled to re-admission in 1962, despite the fact that the statute pursuant to which he should originally have been admitted had expired in 1951.

In *Pierno* v. *Immigration and Naturalization Service,* 397 F. 2d 949 (2nd Cir. 1968), the Second Circuit refused to permit the occurrence of an event during an overly long period of investigation to bar an alien from adjusting her status to permanent resident.

In *Pierno,* an alien petitioned for adjustment of status immediately after her marriage to an American citizen. Several months later, the husband's son by a former marriage commenced a baseless action in New York Supreme Court seeking to annul the marriage. Further proceedings on Mrs. Pierno's petition for adjustment of status

were thereupon stayed by the Immigration Service, pending the outcome of the annulment action. The annulment action was dismissed on December 16, 1964. Seven days later Mr. Pierno died. The Immigration Service then denied Mrs. Pierno's petition on the ground that her husband was no longer alive. The Court refused to permit Mr. Pierno's death to automatically result in a denial. Judge Smith noted that had Mrs. Pierno's petition been determined in the normal course, she might have been granted adjustment of status prior to her husband's untimely death. 397 F. 2d at 951. He ruled that when governmental delays in processing an application occur, events which occur during the lapse period ought not, on grounds of elemental fairness, be used against a petitioner. See also, *Campbell* v. *Esperdy,* 287 F. Supp. 92 (S.D.N.Y. 1968); *Gay* v. *Brownell,* 120 F. Supp. 319 (D. P. Rico 1954).

Thus, an equitable principle, akin but not identical to estoppel has emerged holding that no circumstance which would not have been prejudicial but for the culpable act of a governmental official may be asserted against the victim of such an act. Such an equitable principle is a major safeguard in guaranteeing the existence of meaningful relief from unlawful governmental activity.

The facts of the instant case bear witness to the wisdom of such a principle. Bricker has been denied any opportunity to redress the 1962 violation of his constitutional rights because of a situation which would never have arisen but for that very violation. Due process of law mandates that the change in Bricker's circumstances, attributable as it is to unconstitutional governmental action, may not be asserted against him.

II.

It is a violation of due process of law to retroactively apply New York's new residence requirements to petitioner's 1961 application for admission to the Bar.

In 1961, when petitioner filed his application for admission to the Bar, New York law required merely that an applicant be a New York State resident for at least six months prior to the date of his application. Once the application had been filed, a bar applicant was free to take up residence in another state. *Rules of the Civil Practice 1(e)*. See, §9403(3) CPLR (1963 ed.). In 1965, the residence requirements were amended to provide that an applicant must remain a New York State resident during the pendency of his application. Since petitioner purchased a home in New Jersey in 1967, the New York Courts ruled that he failed to meet the 1965 residence requirement and denied his application "solely on the ground that applicant failed to comply with all the requirements as to residence." Appendix, *infra* at 5a.

There is no doubt that Bricker satisfied the residence requirements in effect in 1961, when he originally applied for admission to the bar. There is equally no doubt that if those 1961 residence requirements were applied to his current attempt to secure admission to the bar, he would satisfy them. However, because the residence ground rules have been amended subsequent to the unconstitutional denial of Bricker's application in 1962, New York has ruled that Bricker is barred from benefiting from the new, constitutionally mandated due process hearing.

New York has made such a ruling despite the fact that but for the delay occasioned by the failure of the Com-

mittee on Character and Fitness to afford Bricker a due process hearing on his original application, the issue of residence would never have entered the case.

To rule, as has New York, that a person is disabled from righting a constitutional wrong because of technical amendments in the law, occurring subsequent to the violation, is to significantly impede the access of our citizens to the vindication of their constitutional rights.

When constitutional rights have been denied, it ought to be the ideal of our judicial system to attempt to place a wronged party in the position which he would have occupied had no constitutional violation occurred. By permitting intervening amendments in the law to retroactively prevent the the vindication of a constitutional right, that noble idea is frustrated, and the original violation of a constitutional right is fossilized.

It is, of course, settled law that certain civil statutes may be applied retroactively without violating the constitution. However, where such a retroactive application frustrates the vindication of a constitutional right, as it does in this case, the retroactive application must be condemned.

This case presents an issue of great importance in insuring the effectiveness of judicial vindication of federal rights. If a government may shield its misdeeds from judicial scrutiny as a result of circumstances traceable to those very misdeeds, the guaranty of due process of law may, in many instances, be reduced to an illusion.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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August 1969

APPENDIX 1

Order Denying Motion for Reconsideration of Application for Admission to the Bar

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 26th day of November, 1962.

Present:

HON. GEORGE J. BELDOCK,
Presiding Justice.
" HENRY L. UGHETTA,
" PHILIP M. KLEINFELD,
" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
Justices.

In the Matter of

JEROME BRICKER,

Applicant.

The above named Jerome Bricker, also known as Jerome L. Bricker and Jerry Bricker, having made an application, dated February 20, 1961, to the Appellate Division of the Supreme Court, Second Judicial Department, upon a certificate of the State Board of Law Examiners, dated January 18th, 1961, for admission as an attorney and counselor at law of the State of New York, and the said application having been referred to the Committee on Character

and Fitness for the Second and Tenth Judicial Districts, in and for the Second Judicial Department, for investigation, and the report of said Committee on Character and Fitness having been duly filed, and this court by order dated and entered May 7th, 1962, having denied said application for admission to the Bar upon the ground that the applicant has failed to satisfy this court that he possesses the character and general fitness requisite for an attorney and counselor at law (Judiciary Law, Sec. 90, subd. 1a), and the said applicant having moved for reconsideration of his application for admission to the Bar or for other relief, by a notice of motion, dated October 26, 1962.

Now on reading and filing said notice of motion, the affidavit of Jerome Bricker, and all the papers filed herein, and the said motion having been submitted by Jerome Bricker, the applicant in person, and due deliberation having been had thereon:

It is Ordered that the said motion for reconsideration of application for admission to the Bar or for other relief, be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk.

APPENDIX 2

Order Granting Renewal of Application

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 26th day of October, 1966.

Present:

HON. GEORGE J. BELDOCK,
Presiding Justice.
" HENRY L. UGHETTA,
" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
Justices.

In the Matter of the application of

JEROME BRICKER,

Petitioner,

for admission to the Bar.

The above named Jerome Bricker, by petition verified July 20, 1966, having made an application to this court for a hearing and determination de novo of his prior application for admission to the Bar of the State of New York, previously denied by orders of this court dated May 7, 1962 and November 26, 1962;

Now, on reading and filing said petition, affidavits of Abraham Melamed, Henry York, Bernard H. Loizzo and Rabbi Abraham Kupchik in support of said application and the application having been submitted by Abraham Melamed, Esq., of counsel for petitioner and due deliberation having been had thereon; and upon the decision slip of the court herein, it is:

ORDERED that the petition is hereby referred to the Committee on Character and Fitness of the Second Judicial District for: (a) investigation and hearing as to whether the applicant presently possesses the requisite character and fitness for an attorney at law; and (b) a report setting forth the Committee's findings and recommendations; and it is further

ORDERED in the event the Committee recommends denial of the application, its report shall contain appropriate findings showing the basis for the recommendations. In the event the Committee recommends that the applicant be admitted to the Bar, no findings need be set forth in the report; and it is further

ORDERED that pending the investigation, hearing and report, the application shall be held in abeyance.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

APPENDIX 3

Order Denying Application

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 18, 1968.

HON. GEORGE J. BELDOCK,
Presiding Justice.
HON. MARCUS G. CHRIST,
HON. ARTHUR D. BRENNAN,
HON. SAMUEL RABIN,
HON. JAMES D. HOPKINS,
Justices.

In the Matter of the Application of

JEROME BRICKER,
Petitioner,

for admission to the Bar.

The above named Jerome Bricker, by petition verified July 20, 1966 having made an application to this court for a hearing and determination de novo of his prior application for admission to the Bar of the State of New York, previously denied by orders of this court dated May 7, 1962 and November 26, 1962; the said application and all the papers thereon having been considered by this court and after due deliberation and upon the opinion and decision slip of the court herein, heretofore filed, it is:

ORDERED that the renewed application for admission to the Bar is hereby denied on the sole ground that the applicant has failed to comply with all the requirements as to residence in New York (CPLR 9406; Rule II of the Court of Appeals' rules for Admission of Attorneys and Counselors-at-law).

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

APPENDIX 4

Order Granting Leave to Appeal

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on May 20, 1968.

HON. GEORGE J. BELDOCK,
Presiding Justice.

HON. MARCUS G. CHRIST,
HON. ARTHUR D. BRENNAN,
HON. SAMUEL RABIN,
HON. JAMES D. HOPKINS,
Associate Justices.

In the Matter of:

JEROME BRICKER

For Admission to the Bar of the State of New York.

The above-named JEROME BRICKER, petitioner, having moved this court, by notice of motion dated April 12, 1968, (1) to vacate the order of this court dated March 18, 1968 and to direct that he be admitted to the Bar or (2) in the alternative, to vacate said order and other orders and for reconsideration or (3) in the further alternative, for leave to appeal to the Court of Appeals;

Now, upon the papers filed in support of said motion, and there being no opposition thereto; and upon all the other papers filed herein and upon all the proceedings heretofore had; and the matter having been submitted by Irene Weiss, Esq., of counsel for the petitioner; and due deliberation having been had thereon; it is:

ORDERED that the said motion is hereby granted to the extent of granting petitioner leave to appeal to the Court of Appeals from the order of this court dated March 18, 1968. In our opinion, questions of law have arisen which ought to be reviewed. In all other respects, motion denied.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

APPENDIX 5

Order of the Court of Appeals

COURT OF APPEALS
OF THE STATE OF NEW YORK

No. 361

In the Matter of the Application of

JEROME BRICKER,

Appellant,

For Admission to the Bar of the State of New York,

COMMITTEE ON CHARACTER AND FITNESS,
SECOND JUDICIAL DEPARTMENT,

Respondent.

Order affirmed, without costs, solely on the ground that the applicant failed to comply with all the requirements as to residence (CPLR 9406).

No opinion.

Concur: Fuld, Ch. J., Burke, Scileppi, Bergan, Breitel and Jasen, JJ.

May 28, 1969

EME COURT. U. S

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In the Matter of the Application of

JEROME BRICKER,

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for Admission to the Bar of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 519

In the Matter of the Application of

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, the Committee on Character and Fitness of the Appellate Division of the New York Supreme Court, Second Judicial Department, opposes the petition herein and asks that it be denied.

Statement

Petitioner seeks a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, entered May 28, 1969.

The judgment which petitioner seeks to have reviewed had affirmed, "solely on the ground that appellant failed to comply with all the requirements as to residence (CPLR, 9406, subd. 3)," an order of the Appellate Division, Second

Department, entered March 18, 1968, which had denied petitioner's *renewed* application for admission to the Bar of the State of New York "on the sole ground that the applicant had failed to comply with all the requirements as to residence in New York" (6a, 9a).

The New York Court of Appeals did not even purport to pass upon any constitutional question. Annexed hereto, as Appendix A, is a schedule of papers transmitted to the New York Court of Appeals, on July 18, 1968, by the Appellate Division. These papers will show that neither the Appellate Division nor the Court of Appeals ultimately passed upon any question except that of petitioner's non-continued New York residence.

Facts

(1)

Petitioner's 1961 application for admission to the Bar of the State of New York was denied by the Appellate Division on May 7, 1962, which denied reconsideration of that application on November 26, 1962.

(2)

His petition sworn to July 20, 1966, sought "a hearing and determination *de novo* of his prior application" (3a). Reconsideration was sought not only on due process grounds, by reason of the Committee's failure in 1962 to give petitioner notice of charges as required by this Court's decision in 1963 in *Willner* v. *Committee on Character*, 373 U. S. 96, but also on the ground that when his 1962 hearing was held "it was during a period of his life when he was under severe emotional strain" (Melamed affidavit of July 19, 1966, p. 3; Bricker affidavits of October 26, 1962 and July 20, 1966).

The Appellate Division, on October 26, 1966, granted the petition to the extent of referring it to its Committee

on Character and Fitness (hereinafter called the Committee) for (4a):

> "(a) investigation and heearing as to whether the applicant *presently* possesses the requisite character and fitness for an attorney at law; and (b) a report setting forth the Committee's findings and recommendations." (Italics supplied)

The Appellate Division further ordered that (4a):

> "in the event the Committee recommends denial of the application, its report shall contain appropriate findings showing the basis for the recommendations. In the event the Committee recommends that the applicant be admitted to the Bar, no findings need be set forth in the report."

Finally, the Appellate Division ordered that "pending the investigation, hearing and report, the application shall be held in abeyance" (4a).

(3)

Hearings were held by the Committee on June 22, 1967 and August 15, 1967, subsequent to the petitioner's filing on January 13, 1967 of a *new* application for admission, which was resworn to on January 16, 1967 and April 10, 1967. Notices of hearing were sent to the petitioner in advance of the hearings, on June 2, 1967 and August 2, 1967. Annexed hereto as Appendix "B", is a copy of the letter dated June 2, 1967, informing petitioner of the subjects to be considered at the Committee's hearing (*infra*, pp. 9-11). The August 2, 1967 letter notified petitioner that his residence would be covered at the August 15, 1967 hearing.

Petitioner had informed the Committee, by letter dated July 7, 1967, that his address had been changed, on July 1, 1967, to 33 Back Drive, Edison, New Jersey.

(4)

The *Committee* made the following unanimous report, dated October 4, 1967, to the Appellate Division:

> "The Committee finds that the applicant demonstrated, in his original questionnaire and the proceedings incidental to it and in his current questionnaire, and in the hearing of June 22, 1967, that he was careless, indifferent, negligent, and inaccurate in his answers under oath to questions put to him in writing and orally. The answers, when furnished, however are not of a nature that would cast doubt upon his character. The Committee is persuaded and finds that there never was, nor is there now any actual intent to misrepresent to, or practice a fraud upon, the Committee.
>
> Although the Committee finds the applicant possesses the requisite character, it also finds that the applicant lacks the general fitness to practice law.
>
> In addition, the Committee unanimously finds that applicant has not been an actual resident of the State of New York since July 1, 1967.
>
> Accordingly, the Committee recommends that the application be denied."

ARGUMENT

No substantial federal question is presented by this petition.

(1)

Neither the Appellate Division of the New York Supreme Court nor the New York Court of Appeals purported to pass upon any constitutional question. *Cf. Willner* v. *Committee on Character*, 373 U. S. 96, 102 (1963), where the Court of Appeals had amended its remittitur to recite that upon the appeal to that Court there was presented "and necessarily passed upon a question under the Con-

stitution of the United States." See also *Willner* (373 U. S., at p. 106), where Mr. Justice DOUGLAS refused to reject the Court of Appeals' statement that it had "necessarily" decided a constitutional question.

(2)

Next, we note that, under the procedure adopted by the Respondent, the application which was pending before it when petitioner changed his residence was not his original 1961 application, but the new application filed by him in 1967, pursuant to the Appellate Division's permission to renew his application for admission. The requirement of "continued" residence in New York until the disposition of an "application for admission to practice" had been enacted by L. 1965, Ch. 675 and had become effective in September 1965, prior to the date of petitioner's new application.

(3)

Further, it should not be overlooked that the Appellate Division, upon the record before it, had in 1966 referred petitioner's application for admission to practice to respondent for investigation and hearing as to whether he "presently" possessed the requisite character and fitness for an attorney at law (4a). Respondent was not directed to treat the 1961 application as a continuing one, a direction that would have been particularly inapposite in the light of the fact that (1) his record contained indications that he had in 1957, and possibly on three other occasions applied for admission to the *Florida* Bar (Appendix B) prior to his 1961 application to New York for admission; and (2) that in 1961, petitioner's emotional upsets set forth as exculpatory facts in 1966 in seeking a reappraisal of his character, seem to have warranted his rejection at that time. Clearly, both the Appellate Division and the Respondent were concerned with the petitioner's status as of the time of his 1967 reapplication to New York.

(4)

There is nothing in this Court's decision in *Willner* (*supra*), which indicates that this Court's decision in that case should be given *retroactive* effect. If petitioner had not been accorded due process by the methods employed in 1962 in passing upon his 1961 application, he did not by reason of such deprivation of his appropriate procedural rights, obtain a substantive right to admission to the New York Bar, regardless of character and fitness. He became entitled to and was accorded proper notice and hearing in connection with the opportunity he was afforded by the Appellate Division to re-apply for admission (Appendix B).

Indeed, in *Willner*, this Court made it abundantly clear that, even when it found that appropriate notice and hearing had not been given an applicant, *Willner* had not obtained an absolute right to admission. This Court remanded *Willner's* application to the New York Courts for further disposition in accordance with the Court's opinion (373 U. S. 96, 106, 109; 375 U. S. 950, denying motion to amend mandate). Petitioner, even if he had pursued his rights as energetically as *Willner* had, would not have obtained a vested right to admission. See *Pearsall* v. *Great Northern R.R.*, 161 U. S. 646 (1896); *Re McGlone*, 284 N. Y. 527 (1940), aff'd 314 U. S. 556 (1942). Since petitioner did not even seek review of his 1961 application either by the New York Court of Appeals or by this Court, he is in no position to challenge New York's right to weigh in accordance with its 1967 standards the renewed application which New York allowed him to make in 1967.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, September 2, 1969

LOUIS J. LEFKOWITZ
Attorney General of the State of
New York
Attorney for the Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

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Assistant Attorney General
of Counsel

APPENDIX A

Schedule of papers transmitted by Appellate Division to Court of Appeals on July 18, 1968.

1. Application for admission to the Bar, verified March 29, 1961 and resworn to April 3, 1961; Application for admission to the Bar, verified January 13, 1967 and resworn to April 10, 1967, together with all the papers annexed thereto, including minutes of hearing September 27, 1961;
2. Certification of State Board of Law Examiners, dated January 18, 1961;
3. Order of Appellate Division, dated May 7, 1962, denying 1961 application;
4. Order of Appellate Division, dated November 26, 1962 denying reconsideration of application for admission, with affidavit of applicant, dated October 26, 1962;
5. Order of Appellate Division, dated October 26, 1966 referring application for admission to Committee on Character and Fitness, for investigation and hearing together with affidavits;
6. Report dated September 29, 1967 and recommendation dated October 4, 1967 of Committee on Character and Fitness; together with transcript of minutes of hearing June 22, 1967 and August 15, 1967 (pp. 1 to 154); exhibits A to G; and copy of application of Jerome Bricker for admission to Florida Bar;
7. Order of Appellate Division, dated March 18, 1968 denying renewed application for admission to the Bar;
8. Order of Appellate Division, dated May 20, 1968 with accompanying papers granting leave to appeal to the Court of Appeals * * *.

APPENDIX B

Mr. Jerome Bricker
137-75 Geranium Avenue
Flushing, New York 11355

Dear Mr. Bricker:

Your application for reconsideration of your application for admission to the Bar has been referred to a Subcommittee, to take proof of all relevant facts and circumstances relating to, or bearing upon, the following matters, and to report thereon to the full Committee, namely:

(1) The omission in your sworn original application for admission to the Bar of this State (filed February 20, 1961) of residences, traffic and parking violations, indebtedness, lawsuits against you, place of employment, membership in the Marine Corps Reserve, and other organizations.

(2) The improper registration of your automobile.

(3) Your initial inability to recall the service upon you of a subpoena in supplementary proceedings.

(4) The dates of your employment by Allstate, and reason for termination of said employment.

(5) The failure, at any time, in connection with the aforesaid original application, to indicate that you had lived in Florida and had applied for admission to the Florida Bar examination in 1957, followed by three supplemental applications all sworn prior to 1961 application herein.

(6) Your failure to advise the Florida Bar Examiners on the occasion of your 1957 application and the said three supplemental applications:

(a) of every residence you had;

(b) of your membership in the Marine Corps Reserve;

Appendix B (Continued)

(c) of each employer by whom you had been employed, and

(d) of traffic offenses.

(7) Your failure in your sworn application to the Florida Bar Examiners in 1966, to advise:

(a) of each employer by whom you had been employed;

(b) of the claims made against you, and

(c) of each and every club, organization, etc. of which you had been a member.

(8) Your failure to advise in your sworn application for reconsideration, filed here January 16, 1967:

(a) of your employment by Edison Coffee Shop;

(b) of your employment by the County Abstract Corp., and

(c) of a speeding violation in Eastchester, New York in 1955.

(9) Your failure to list in your application to the State Liquor Authority your employment by the Hamla Corp.

(10) Such other and further matters as may properly come before the Subcommittee.

A hearing will be held at the office of the Committee, Room 666, Supreme Court Building, Brooklyn, New York, on Thursday, June 22, 1967, at 2:30 p.m.

You may, if you wish, at all times be represented by a duly licensed attorney-at-law of this State. Subpoenas, if desired, may be obtained through this office.

At such hearing, you are entitled to cross-examine any witnesses called therein, and to examine and, at your ex-

Appendix B (Continued)

pense, to make copies of any documents or other papers offered in evidence, and to obtain a copy of the transcript of such hearing at your expense.

If any new matters may be developed at the said hearing, even though not hereinabove specifically set forth, at the conclusion of said hearing, an opportunity will be afforded to you to present further proof at a later date as to any such new matters, or to furnish any proof in rebuttal of any evidence developed in said hearing; and to offer any other evidence which you deem relative to your application.

If you or your attorney desire any further information as to the procedures in said hearing, same may be obtained from the undersigned.

Please advise the undersigned, in writing, whether you will appear at the time and place indicated.

Dated: June 2, 1967.

.....
Secretary

JFH:pp